FILED
United States Court of Appeals
Tenth Circuit

September 26, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SHARON R. BAKER, Plaintiff - Appellant, v. ECHOSTAR COMMUNICATIONS CORPORATION; ECHOSPHERE, L.L.C.; ECHOSTAR SATELLITE, L.L.C., Defendants - Appellees.	No. 08-1232 (D.C. No. 1:06-CV-01103-ZLW-BNB)

ORDER

Before **HARTZ**, **McCONNELL** and **HOLMES**, Circuit Judges.

This matter comes on for consideration of the parties' responses to this court's jurisdictional show cause order. Upon consideration thereof, we conclude that the plaintiff's notice of appeal was filed out-of-time and that the appeal must be dismissed.

The defendants' motion to alter or amend the district court's judgment entered on March 14, 2008 did not toll the time to appeal because the motion addressed the issue of costs only. *See Utah Women's Clinic, Inc. v. Leavitt*, 75 F.3d 564, 567 (10th

Cir.) ("[A] Rule 59(e) motion, challenging only the award of costs and attorney's fees, does not toll the time for a merits appeal. The Supreme Court has created a uniform rule, regardless of the statutory or decisional law which authorizes the award and despite claims that fee matters are part of the merits.") (citing to *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 267-68 (1988) (per curiam) (costs) and *White v. New Hampshire*, 455 U.S. 445, 451 (1982) (attorney fees)).

Utah Women's Clinic rejected the argument made by the plaintiff here: that because the original judgment denied costs, the defendants' motion is a tolling motion under Rule 4.

> Plaintiffs argue that their Rule 59(e) motion questioned the correctness of the February decisions insofar as attorney's fees are concerned; however, that does not change the fact that costs and attorney's fees normally are collateral to the merits judgment, particularly when the judgment contemplates significant further proceedings concerning costs and attorney's fees. Therefore, a Rule 59(e) motion, challenging only the award of costs and attorney's fees, does not toll the time for a merits appeal. The Supreme Court has created a uniform rule, regardless of the statutory or decisional law which authorizes the award and despite claims that fee matters are part of the merits.

Id. (citing to *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201-02 (1988)).

The plaintiff also argues that *Utah Women's Clinic* was wrongly decided. However, one three-judge panel cannot overrule the judgment of another panel. *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993).

The plaintiff also urges this court to adopt the Fifth Circuit's position in

Ramsey v. Colonial Life Insurance Co., 12 F.3d 472 (5th Cir. 1984) (holding that a Rule 59(e) motion directed to a merits judgment awarding a sum certain for attorney fees and costs which only sought reconsideration of the attorney fees award was a tolling motion). First, this position was rejected by this court in *Utah Women's Clinic*. *See* 75 F.3d at 568 ("We do not think that *Ramsey* was meant to apply where the Rule 59(e) motion is directed to a merits judgment *awarding* both attorney fees and costs which will be quantified at some future date.") (emphasis in the original). Second, *Ramsey*, which was decided before *Budinich* and *Buchanan*, was overruled in *Moody National Bank v. GE Life and Annuity Assurance Co.*, 383 F.3d 249, 252-53 (5th Cir. 2004). *Moody* discusses the change in Rule 4(a)(4) made in 1993 which included among the motions that will toll the time for filing an appeal motions for attorney fees under Fed. R. Civ. P. 54 if the district court extends the time to appeal under Rule 58. The *Moody* court noted that Rule 58 makes no provisions for extending the time to appeal relating to the taxing of costs. "Because Rule 58(c)(2) is silent on post-judgment motions addressing costs, the intent of the rule is clear: a post-judgment motion addressing costs will not extend the time to appeal." *Id*. at 253. "Thus, reading [Rule 4(a)(4)] and the rule it refers to – Rule 58 – together, it is clear to us that any post-judgment motion addressing costs or attorney's fees must be considered a collateral issue even when costs or attorney's fees are included in a final judgment." *Id*.

The plaintiff also contends that it is unfair to punish her for relying on the

wording of the text of the Federal Rules of Appellate Procedure. However, the law has been clear since 1988 when the Supreme Court decided *Budinich* and *Buchanan*, and reiterated by this court in 1996 when *Utah Women's Clinic* was published, that costs are collateral to the merits, and that a Rule 59 motion addressing only costs does not postpone the time to appeal. Moreover, had counsel for the plaintiff checked the history of *Ramsey*, the case he so heavily relies on, he would have learned: 1) that *Ramsey* had been overruled; and 2) that a Rule 59(e) motion challenging only the award of costs does not toll the time to appeal.

Because a timely notice of appeal in a civil case is both mandatory and jurisdictional, *see Bowles v. Russell*, ___ U.S. ___, 127 S.Ct. 2360, 2363, 2366 (2007), this appeal is **DISMISSED**. This order does not prohibit the plaintiff from filing a timely appeal from the award of costs after the district court enters a final order on costs.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

Ellen Rich Reiter

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